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No. 75-1295

In the
Supreme Court of the United States
SPRING TERM, 1976

KENNETH J. BRYZA,
Petitioner,

vs.

THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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IN THE

SUPREME COURT OF THE UNITED STATES

SPRING TERM, 1976

No.

KENNETH J. BRYZA,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner, Kenneth J. Bryza, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit affirming a judgment of conviction entered by the United States District Court for the Northern District of Illinois.

OPINION BELOW

The opinion of the Court of Appeals, reported as 522 F. 2d 414 (7th Cir. 1975), is printed as Appendix A to this petition.

JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was entered on August 25, 1975 (Appendix A).

A petition for rehearing, timely filed on September 8, 1975 with the suggestion it be heard *en banc,* was ultimately denied on February 12, 1976 (Appendix B). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the decision below—that proper defense cross-examination of an unindicted co-conspirator about favorable Government treatment "opens the door" to otherwise inadmissible Government evidence of co-defendants' guilty pleas—chills a defendant's Sixth Amendment right to confront witnesses.

2. When, if ever, should the prior guilty plea of a Government witness, involved in the same alleged mail fraud scheme with defendant, be admitted into evidence in the Government's case in chief.

3. Whether a violation of 18 U.S.C. § 1341 (mail fraud) is committed by a violation of a private employer's internal work order although the employer suffered no monetary harm and was satisfied with the defendant's job performance; and despite the facts that no preferential treatment was shown to any suppliers with whom defendant dealt, that prices the employer paid suppliers were fair and reasonable, and products the employer obtained were of high quality.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

(1) United States Constitution, Sixth Amendment:

> "In all criminal prosecutions, the accused shall enjoy the right * * * to be confronted with the witnesses against him; * * *."

(2) 18 U.S.C. § 1341 which provides in pertinent part:

> "Whoever, having devised or intending to devise any scheme, or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises . . . places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed any such matter or thing, shall be fined not more than $1,000.00 or imprisoned not more than five years, or both."

STATEMENT OF THE CASE

a. Theory of prosecution

The defendant-petitioner, Kenneth J. Bryza ("petitioner"), was charged in four separate indictments which allege similar acts of wrongful conduct in violation of the Mail Fraud Statute (18 U.S.C. 1341). The indictments were consolidated for trial and appeal.

The indictments charged that petitioner, a purchasing agent for International Harvester, accepted payments from various outside suppliers and salesmen in violation of the company's conflict of interest policy. The government contended that by accepting these payments, petitioner defrauded Harvester of its right to his "loyal and faithful services," despite undisputed evidence, as the Seventh Circuit opinion noted, that "International Harvester was satisfied with Bryza's job performance and the products he purchased for International Harvester from its suppliers, and that no preferential treatment, beyond receiving business, was accorded the suppliers, that the sup-

pliers' prices to International Harvester were fair and reasonable, that International Harvester was never shown to be dissatisfied with the suppliers' prices or products, and that Bryza insisted upon efficiency, quality and fair prices from the suppliers. . . ." (App. A. p. 16a).

The trial evidence was essentially undisputed and is accurately summarized in the opinion of the Court of Appeals (App. 2a-13a). For the convenience of the Court, the following short summary is offered:

b. Trial evidence

Petitioner, prior to indictment, had been employed for seven years as a buyer by International Harvester ("Harvester") in the company's central purchasing department in Chicago, Illinois.

In 1961, Harvester adopted a conflict of interest policy which barred an employee from outside business dealings with any concern with which Harvester had a purchaser-seller relationship. Each year, Harvester employees, including petitioner, in writing acknowledged that they understood the policy and were not in conflict with it.

Beginning in early 1970, certain salesmen and manufacturer's representatives started a series of payments to petitioner personally, based on a percentage of the salesmen's commissions on sales or a set price per unit sold to Harvester. These payments were made by two co-defendants, Nathan and Selzer, who were manufacturer's representatives, and by the Polydoris brothers, unindicted co-conspirators who were acting for their own company. A fourth source of payments was Mason of Bartsch Tool, a co-defendant who was tried separately (and acquitted) and did not testify at the trial. The

payments were made to the order of Searsport Company, which petitioner privately owned.

In mid-1973, Harvester learned of these payments and dismissed petitioner after he denied any knowledge of them. His personnel record reflected that he was fired for a conflict of interest. Although the indictments alleged that the petitioner had obtained "secret profits" to which his employer was legally entitled, Harvester did not demand that petitioner pay to it the subject monies.

The undisputed evidence demonstrates that but for the subject work rule violation, Harvester had regarded defendant as a good employee; that through his efforts, Harvester had received excellent products at the lowest price, including those sold through representatives who had made private payments to petitioner; that no company for whom payments had been made to petitioner in any way received favored treatment from petitioner; or that in any other way petitioner failed to give Harvester his fullest support and loyalty.

c. Introduction of the guilty pleas of co-defendants

Prior to trial, co-defendants Nathan and Selzer pleaded guilty to a scheme to defraud Harvester by virtue of their association with the petitioner. Before they testified, petitioner moved to exclude any reference to their pleas, conviction and sentence. Defense counsel feared that if the jury became aware of these facts, there would be a prejudicial spillover effect which would make the defendant's lack of criminal intent defense difficult for the jury to accept; that the jury would conclude that if these co-defendants admitted guilt, the petitioner, because he was involved in the very same activities, must also be guilty. Defense counsel volunteered to forego

cross-examination of these witnesses as to their pleas or to make any reference to their guilt for impeachment purposes.

The following exchange took place:

> Mr. Chapman [defense counsel]: . . . We move the court to preclude the government from introducing evidence of their pleas and convictions and, of course, we would be bound not to go into it.
>
> The Court: Why?
>
> Mr. Chapman: I feel that where we do not want to go into it for purposes of impeachment, it unfairly prejudices the defendant in this case, your Honor, because we have two people who are alleged to be participants in this scheme being told—
>
> The Court: The only reason for introducing this would be to impeach them.
>
> Mr. Chapman: Right, and I don't intend to impeach them with it, your Honor.
>
> The Court: Why do you want to introduce it then?
>
> Mr. Elsbury: Your Honor, the government would want to introduce it, one, it is indicative of their admission of guilt and their participation in this scheme.
>
> The Court: It isn't necessarily this scheme that is before me.
>
> Mr. Elsbury: Well, it is, that is exactly what they plead guilty to, they were co-defendants with the defendant, your Honor. • • •
>
> Mr. Elsbury: In these cases that are before you.
>
> The Court: In these four cases?
>
> Mr. Elsbury: Yes, they were—Mr. Selzer was the co-defendant with Mr. Bryza in 74 CR 437, and Mr. Nathan was the co-defendant with Mr. Bryza in 74 CR 439, and it is a very material fact. They have plead guilty and it indicates their guilt and their admission of participation in this scheme that they are going to testify to,
>
> • • •

> Mr. Chapman: I would like to point out, your Honor, that the very reason which Mr. Elsbury gave you in support of his position is improper. He is seeking to have this jury draw inferences of guilt from Mr.—to Bryza because two other alleged participants pleaded guilty. What if they had been tried and found not guilty, your Honor? (Tr. 129-131).

The court overruled the defendant's motion and the two witnesses testified and were subsequently cross-examined concerning their guilty pleas, negotiations with the government and sentence.

The Court of Appeals affirmed the evidentiary ruling on the grounds that defense counsel had allegedly opened the door by his earlier interrogation of Stewart Polydoris, an unindicted co-conspirator, about any plea bargain or arrangement for favorable treatment that he may have had with the Government. The Seventh Circuit held that a refusal to admit the evidence of the indictment, guilty pleas and sentences of the co-defendant would have created the impression that the Government had unfairly singled out petitioner.

The Government has repeatedly contended that no error should be treated as reversible error because of the allegedly "overwhelming" guilt of the defendant.

It is respectfully submitted that this argument assumes the very issue that was to be decided by the jury in this case. The evidence demonstrated that there was little controversy as to what actually happened. At trial, Defendant's defense was that he lacked specific intent to violate the law. In other words, the trial court properly instructed the jury (R. 498-99) that before the jury could find defendant guilty, it must find that he committed the acts in question voluntarily, "with knowledge that

[the acts were] prohibited by law and with the purpose of violating the law and not by mistake, accident or in good faith."

Defendant had argued that he had no reason to anticipate that his conduct violated the law; rather that it violated a company work rule only. This defense, which had substantial support in the evidence, was utterly destroyed by the admission of the guilty pleas of two co-defendants who had been involved in the same conduct with defendant. How then could defendant convince a jury that he acted without intent to violate the law when two other co-defendants had pleaded guilty, thereby admitting that they had knowledge that they had violated the law?

REASONS FOR GRANTING THE WRIT

I

THE SEVENTH CIRCUIT'S DECISION, BY CHILLING DEFENDANT'S CONSTITUTIONAL RIGHT OF CROSS-EXAMINATION, CONFLICTS WITH THE RULE OF SMITH VS. STATE OF ILLINOIS, 390 U.S. 129 (1968)

The instant case involves a situation which for many years has become increasingly typical in federal prosecutions: different government witnesses prior to a particular defendant's trial have, or *may* have, made formal or informal arrangements with the government in return for their testimony. Naturally, a defendant's constitutional right to cross-examine a government witness about all such possible arrangements is deeply imbedded in his Sixth Amendment "right • • • to be confronted with the witnesses against him; • • •"

The instant case presents two classic examples of government witness arrangements:

Example One: The witness is as deeply involved in the alleged crime as the defendant, but cooperates early in the investigation with the government. When the indictment is returned, this witness is named as an unindicted co-conspirator, but not as a defendant. The fact of this witness' status as an unindicted co-conspirator is clearly a proper subject of cross-examination in order that the jury may properly evaluate the witness' credibility, *e.g.*, is the witness lying or coloring his testimony because of the favorable treatment accorded him by the government? Stewart Polydoris, a government witness in the instant case, fits Example One.

Example Two: A government witness is in fact indicted, but after arraignment, and usually as the result

of a plea bargain, enters a plea of guilty, agrees to give "truthful testimony" against the remaining defendants, and then (or after trial) receives a favorable sentence, often probation. In many instances, particularly where lack of specific intent to commit the crime is the primary defense, as in the instant case, many defendants seek to prevent introduction into evidence of the guilty plea* of such a witness and offer to forego their constitutional right of cross-examination on all aspects of the plea if the Court will direct the government not to bring out the plea on the witness' direct examination. Nathan and Selzer, government witnesses in the instant case, fit Example Two.

At trial, petitioner by motion *in limine* prior to testimony of Nathan and Selzer (witnesses in Example Two above), moved the court to direct the government to refrain from interrogation of these witnesses about their guilty pleas. In his motion, defendant agreed that he would forego all cross-examination on this matter if the motion was granted. (It should be noted that the defendant did not object to the jury hearing that these witnesses had been indicted but only to their admissions of guilt.) However, the motion was denied, and, on their direct examination, both witnesses testified not only to the fact of their indictment, but to their respective pleas of guilty and sentences.

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* The rationale of this approach is sound: if the witness is involved in the same activity as defendant, evidence that he has acknowledged the criminality of his conduct (including his specific intent to commit the crime) by his plea of guilty, in most instances will in effect either destroy or render extremely hollow defendant's claim that he did not know that his identical conduct was not criminal.

On the instant appeal, the Court of Appeals stated that ordinarily the Nathan and Selzer guilty pleas should not have been admitted in evidence. However, the court ruled that "defense counsel opened the door to the subject" because he had exercised defendant's Sixth Amendment constitutional right to examine Stewart Polydoris, a government witness in Example One above (App. 20a-22a).*

The Court in substance ruled that in order to prevent introduction of otherwise inadmissible testimony from two government witnesses (the guilty pleas and sentences of co-defendants Nathan and Selzer), a defendant, here petitioner, must relinquish his valued constitutional right of cross-examination of a third government witness on matters which strike at the heart of that witness' credibility (here, Stewart Polydoris, an unindicted co-conspirator, as to leniency arrangements he had made with the Government).

The unconstitutional nature of the court's ruling, it is respectfully submitted, is readily apparent. For example, in *Smith* v. *State of Illinois,* 390 U.S. 129 (1968), the Court ruled that the trial court improperly denied defendant the right to ask a government witness where he lived. The Court stated that "to forbid this most rudimentary inquiry at the threshold is effectively to emasculate the right of cross-examination itself": and quoting from *Alford* v. *United States,* 282 U.S. 687, 688-9 (1931): "Prejudice ensues from a denial of the opportunity to

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* The court stated that "Thus, to foreclose the possibility that the jury might incorrectly believe that the government had singled out Bryza for prosecution and punishment, while permitting his co-schemers to go free, the testimony at issue properly was elicited."

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place the witness *in his proper setting* and put the weight of this testimony and his credibility to a test, without which the jury cannot fairly appraise them. * * *" (Emphasis added.) The Court in *Smith* then concluded (390 U.S. at 133) that reversal was required because defendant had been deprived of a right guaranteed to him under the Sixth Amendment of the Constitution.

The need to put Stewart Polydoris "in his proper setting" was even more compelling in the instant case. While defendant in *Smith* did not show what his cross-examination would reveal (see dissent of Harlan, J., 390 U.S. at 134-5), defense counsel's cross-examination exposed matters intimately touching Polydoris' credibility.

The Seventh Circuit Ruling now poses a Hobson's choice to defendants faced with government witnesses who fall within Examples One and Two described above. In order to avoid the inadmissible, highly prejudicial nature of the Example Two witnesses' guilty plea evidence, a defendant must give up his constitutional right to cross-examine an Example One witness on highly relevant matters. Conversely, in order to cross-examine the Example One witness effectively, defendant will "open the door" to the prejudicial testimony of the Example Two witness.

It is difficult to conceive of a more chilling destruction of a constitutional right. It is no answer to state that a defendant in such instances has a choice. Where the choice imposes a penalty as it does in the instant case, it is no choice at all. Rather, we are faced with the destruction of a cherished constitutional right.

The problem posed by the instant case is not hypothetical or isolated. It is faced routinely by trial judges,

government prosecutors and defense lawyers in federal prosecutions. As a consequence, it is respectfully submitted that its resolution by this Court is appropriate.

II

THE COURT SHOULD REVIEW THE ADMISSIBILITY OF GUILTY PLEAS BY CO-DEFENDANT-WITNESSES OFFERED BY THE GOVERNMENT BECAUSE OF THE FREQUENT RECURRENCE OF THIS SIGNIFCANT QUESTION IN MULTIDEFENDANT PROSECUTIONS

As indicated in Section I, the increasing complexity of federal prosecutions has intensified the number of defendants involved. Typically in multi-defendant cases, some defendants plea bargain with the government, even prior to indictment, agreeing to plead guilty when the indictment is returned in return for a favorable recommendation on sentencing by the U.S. Attorney's office; similarly, the indicted defendants often plead guilty at or after arraignment and prior to trial in return for "truthful" testimony against remaining co-defendants and a favorable recommendation at sentencing by the government.

To defendant's knowledge, the Court has never ruled upon admissibility of these guilty pleas at the request of the government. The lower courts have employed a number of rules, depending on the facts of the particular plea, although none has ruled that the evidence in and of itself is admissible.

The confusion which has arisen because the Court has not had occasion to issue a definitive ruling on this extremely important question, is represented by the inaccurate analysis of prior decisions on this question by the decision below.

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Thus, the decision below cites four cases as examples of the narrow instances in which evidence of a co-defendant's guilty plea is admissible: (*United States* v. *Kahn*, 381 F. 2d 824 (7th Cir. 1967); *United States* v. *Aldridge*, 484 F. 2d 655 (7th Cir. 1973); *United States* v. *Harris*, 437 F. 2d 686 (D.C. Cir. 1970); *United States* v. *King*, 505 F. 2d 602 (5th Cir. 1974). In three of these cases, *Kahn*, *Aldridge* and *Harris*, the guilty plea took place *during* trial and the jury was told why a defendant was suddenly absent. In *none* of those cases did the former co-defendant testify.

The fourth case, *United States* v. *King*, is the only case where the prosecution was permitted to bring out the otherwise inadmissible guilty plea of a co-defendant because of the tactics of opposing counsel, *i.e.*, because the defense attorney "opened the door." The facts of that case, however, are so far removed from the instant one that reliance on it is totally misplaced.

In *King*, the defense attorney attempted to use the guilty plea of the co-defendant witness to attack the witness' credibility. In his opening statement to the jury, defense counsel brought up the fact that the prospective witness was a convicted felon and that the defense intended to use this to impeach his credibility.

On direct examination of the co-defendant, the prosecutor, anticipating this defense argument, brought out the fact that the witness had pleaded guilty to the same fraud transaction for which the defendant was then on trial. Defense counsel made no objection to this testimony and sought no limiting instruction.

The Fifth Circuit held that, under the circumstances there present, it was not "plain error" to admit the plea. In so holding, the court also recognized that:

> "(T)here is potential prejudice inherent in a witness' statement that he was the defendant('s) accomplice or co-conspirator, and that he has pled guilty to the crime for which the defendant is charged. One person's guilty plea or conviction may not be used as substantive evidence of the guilt of another." 505 F. 2d at 607

See also *United States* v. *Restaino,* 369 F. 2d 544 (3d Cir. 1966) where the court took another approach (p. 545):

> "Unless undue emphasis is placed upon the fact that such pleas have been made * * *, informing the jury that such pleas have been entered is not ordinarily erroneous."

For other instances of conflicting rulings on this question, see *Nigro* v. *United States,* 117 F.2d 624, 632 (8th Cir. 1941) (jury should not be told of guilty pleas of defendant's codefendants unless they appear as witnesses at a defendant's trial and testify as to their guilt); *Walker* v. *United States,* 93 F. 2d 383, 395 (8th Cir. 1937), *cert. denied,* 303 U.S. 644 (1938) (where defendant's codefendants took the stand as witnesses at defendant's trial and testified fully as to their part in the alleged crime, it was not prejudicial error to have received their pleas of nolo contendere in presence of jury); *United States* v. *Newman,* 490 F. 2d 139, 143 (3d Cir. 1974) (although guilty pleas and convictions of codefendants are not admissible to demonstrate guilt of defendants yet to be convicted, the admission of such evidence is not reversible error, provided cautionary instructions are given and there is no undue emphasis placed upon such evidence); *United States* v. *Rothman,* 463 F. 2d 488, 490 (2d Cir.), *cert. denied,* 409 U.S. 956 (1972) (failure to give unrequested limiting instruction not plain error

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where government counsel, although introducing evidence of witnesses' prior guilty pleas, did not stress the pleas and did not suggest to jury that it could infer defendants' guilt from the pleas of their coindictees).

As a consequence, it is respectfully submitted that the Court should grant the instant petition so that it can review this very important question of evidence applicable to a great many federal prosecutions.

III

THE SEVENTH CIRCUIT INTERPRETATION OF THE MAIL FRAUD STATUTE IS FAR BROADER THAN THAT OF ANY OTHER CIRCUIT AND SHOULD BE REVIEWED BY THE COURT

In this case and in the case of *United States* v. *George*, 477 F. 2d 508 (7th Cir. 1973), *cert. den.*, 414 U.S. 873, the Seventh Circuit Court of Appeals gave an extremely broad and expansive interpretation to the mail fraud statute (18 U.S.C. §1341) far beyond that of any other circuit.

No other circuit has taken the mail fraud statute to the extremes exemplified in this case. The decision below stands for the proposition that it is a criminal fraud and an offense against the United States of America for a private employee of a private corporation to violate an employment agreement between himself and his employer when using the mails in the process. It is respectfully submitted that whether such a broad interpretation is warranted should be determined by the Supreme Court of the United States.

In this case, the Seventh Circuit adopted a so-called "unfaithful servant" theory and applied it to a private employer-employee situation. There is no question but

that the petitioner violated the International Harvester conflict of interest policy. According to the opinion, however, the mere fact of violating the agreement is *ipso facto* fraudulent. It matters not, according to this theory, that the employer lost no business because of the acts of the employee; that it lost no profits or good will. It matters not that the items purchased by the petitioner were not in any way defective or of a lesser quality; or whether other suppliers were available who could have provided cheaper or better quality materials.

The fraud here is much more ephemeral and theoretical. It is impossible of quantitative proof. The decision in effect says the petitioner's conduct "is fraudulent because it is." No amount of evidence could possibly refute such a conclusion.

Unlike other "unfaithful servant" cases such as *United States* v. *Frazer,* 303 F. Supp. 380 (E.D.La. 1969); *United States* v. *Proctor & Gamble,* 47 F. Supp. 676 (D. Mass. 1942); *United States* v. *Isaacs,* 493 F. 2d 1124 (7th Cir. 1974); *United States* v. *Dorfman,* 335 F. Supp. 675 (S.D.N.Y. 1971) where the facts showed that the defendants agreed to use their fiduciary positions to aid another party at the expense of the employer, there was nothing in the instant case to show that the suppliers received any preferential treatment. There was no proof that any was offered, sought or provided.

For example, in *United States* v. *Fraser,* 303 F. Supp. 380 (E.D. La. 1969), the defendants, while acting in their official capacity as agents of the State of Louisiana, deposited state funds in non-interest bearing accounts in exchange for kickbacks from the depository banks. There can be no question in that case that the State of

Louisiana was deprived of certain potential income which it would have received had the same funds been deposited in interest bearing accounts. There was a feasible loss to the State of Louisiana and its taxpayers.

That case is in sharp contrast to the instant one where all the evidence showed that the payments to the petitioner had not one iota of impact on the quality of products International Harvester received or the prices it paid.

According to the Seventh Circuit: "The fraud consisted of Bryza's holding himself out to be a loyal employee, acting in I-H's best interest, but actually not giving his honest and faithful services." (App. A, 16a) If this rationale were to be accepted, a "fraud" would be committed anytime one individual violated a private agreement with another. A federal crime would result if the United States mails were coincidentally used in the process. This would be so even if the evidence showed, as it did in this case, that the "defrauded" party got everything it was entitled to get from the agreement.

Respectfully submitted,

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APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 75-1215, 75-1216, 75-1217, and 75-1218 Consolidated

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

KENNETH J. BRYZA,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division
Nos. 74 CR 439, 74 CR 438, 74 CR 437, 74 CR 433
RICHARD B. AUSTIN, *Judge*

ARGUED JUNE 6, 1975 — DECIDED AUGUST 25, 1975

Before MOORE, *Senior Circuit Judge**, CUMMINGS and BAUER, *Circuit Judges.*

BAUER, *Circuit Judge.* Defendant-appellant, Kenneth J. Bryza, was charged in four separate indictments with violations of the mail fraud statute, 18 U.S.C. §1341.[1] In

* The Hon. Leonard P. Moore Senior Circuit Judge, Second Circuit, is sitting by designation.

[1] 18 U.S.C. §1341 states, *inter alia*:

"Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining

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one of the indictments he was also charged with using a false name to carry out a mail fraud scheme in violation of 18 U.S.C. §1342.[2] In substance each of the four indictments alleged that the defendant, while acting as a purchasing agent for International Harvester Company (hereinafter referred to at times as "I-H"), accepted payments from various outside salesmen and suppliers[3] of I-H in

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[1] (Continued)

money or property by means of false or fraudulent pretenses, . . . for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both."

[2] 18 U.S.C. §1342 states:

"Whoever, for the purpose of conducting, promoting or carrying on by means of the Postal Service, any scheme or device mentioned in section 1341 of this title or any other unlawful business, uses or assumes, or requests to be addressed by, any fictitious, false, or assumed title, name, or address or name other than his own proper name, or takes or receives from any post office or authorized depository of mail matter, any letter, postal card, package, or other mail matter addressed to any such fictitious, false, or assumed title, name, or address, or name other than his own proper name, shall be fined not more than $1,000 or imprisoned not more than five years, or both."

[3] The outside suppliers and salesmen were also indicted with Bryza. The first indictment, 74 CR 433, contained eleven counts and named only Bryza. The second indictment, 74 CR 437, contained thirteen counts and named Bryza and Max Selzer. Selzer pled guilty, received three

violation of the company's conflict of interest policy. These payments were channelled to the defendant through Searsport Company, an entity organized by the defendant specifically for that purpose. The government contended that as a result of these payments to Bryza, I-H was deprived of its rights to have its business conducted in an honest manner, to the loyal, faithful and honest services of its employee Bryza, and to the secret profits Bryza received. Following a jury trial, Bryza was convicted on all remaining counts in all four indictments.[4] The trial judge imposed concurrent one year terms of probation. As a special condition of probation, Bryza was ordered to serve the first 177 days in the custody of the Attorney General.

I. PERSONS AND PARTIES INVOLVED IN THE ALLEGED MAIL FRAUD SCHEME.

Defendant Bryza has been employed in the corporate purchasing field for the past sixteen years. Since December, 1966, Bryza has been employed by International Harvester in the capacity of a buyer in the central purchasing department. His responsibilities included negotiating contracts with suppliers, placing business, evaluating sources, overseeing the services of suppliers and the quality of their products, and working with the engineering department to ensure that purchased products met company specifications. During the time he worked at International Harvester Bryza also taught a course at Northwestern University School of Business.

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[3] (Continued)
years probation, and a $1,000 fine on four counts. The third indictment, 74 CR 438, contained ten counts and named Bryza and Yeadon D. Mason. Mason was subsequently acquitted in a jury trial. The fourth indictment, 74 CR 439, contained thirteen counts and named Bryza and Marvin B. Nathan. Nathan, like Selzer pled guilty and received three years probation and a $1,000 fine on five counts.

[4] Prior to trial, counts six through thirteen of indictment 74 CR 437 were dismissed by the government.

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On the average, the defendant was responsible for approximately 175 contracts. He purchased from $35 to $40 million in goods per year from sources throughout the country. Before any buyer could approve a purchase, there had to be a formal requisition from one of the many plants Harvester maintained across the country. When such a requisition came in, it became the responsibility of the particular buyer for that item to secure a source. If the part requested had a specific mechanical function (most of the items Bryza bought had such a function), the requisition was normally accompanied by blueprints from the I-H engineering department. It was often the case that a particular supplier had been classified as an "Approved Source" by I-H engineering. The notation "Approved Source" would appear on the blue print and in such a situation the buyer had no choice but to purchase from that particular source.

In other circumstances, the buyer was to send the blueprints and seek quotations from one or more potential suppliers whom he knew to be capable of producing the product sought. If more than one supplier submitted a bid, the buyer would then evaluate them based on past history of sales, quality, price and delivery capabilities. The buyer's performance was continually supervised and critiqued by the various departments placing the orders and by his own superiors.

A. PAYMENTS FROM MARVIN NATHAN

Marvin Nathan first met the defendant in 1967. At that time, Nathan was the sales representative of the Albany Chicago Corporation and he called on Bryza in an attempt to secure more sales for Albany Chicago to International Harvester. According to the defendant, Nathan was an excellent manufacturer's representative and because of this, Bryza recommended Nathan to the Tenna Corporation and to the Hallmark Company, I-H suppliers, who at the time were looking for a sales representative in the Chicago area.

Over the next several years, Nathan and Bryza saw each other frequently. In December of 1969 they had a luncheon meeting. During the course of the meeting they reached an agreement whereby Bryza would receive a certain percentage of Nathan's commissions in return for aiding Nathan in obtaining two accounts and then watching over them. These payments were to be paid to Bryza through a separate entity called Searsport Company. The evidence is in dispute as to whether Bryza or Nathan suggested the idea of an independent phony consulting company to wash the payment monies. It is clear that Nathan supplied all of the stationary for Searsport. However, Bryza himself took all the initial steps to set up Searsport Company.

In January, 1970, Bryza applied for and received Post Office Box 662, Arlington Heights, Illinois, in the name of the Searsport Company. Shortly thereafter, on February 21, 1970, Bryza opened a checking account for Searsport at the Schaumberg State Bank, Schaumberg, Illinois. The persons authorized to sign on that account were Bryza and "Charles W. Morgan,"[5] a name adopted by Bryza.

In February, 1970, Bryza asked Nathan for an advance payment in the amount of $500. Accordingly, on February 3, 1970, Nathan complied with the demand by paying Bryza $500 by a check made payable to the Searsport Company. After the first payment was made in February, 1970, Nathan continued until July, 1973 to make payments to Bryza on the commissions Nathan received from the Tenna and Hallmark accounts.

The Tenna and Hallmark accounts were not the only accounts on which Nathan made payments to Bryza. In May or June, 1971, Nathan and Bryza had a conversation

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[5] In his brief, Bryza admits that the name "Charles W. Morgan" was taken from a New England whaling ship. Bryza adopted this pseudonym for use in operating Searsport. It is clear that there is no other party involved in this case called Charles W. Morgan.

about the Albany-Chicago Company, which, like Tenna and Hallmark, was an I-H supplier and for which Nathan was a manufacturer's representative and Bryza was the I-H purchasing agent. At that time, Bryza told Nathan to retroactively compute the commissions Nathan had earned from January, 1970 to June, 1971, on the Albany-Chicago account and to pay Bryza a portion of those commissions. Nathan agreed to the arrangement and made the requested payment to Bryza through Searsport. Thereafter, from June, 1971 to July, 1973, Nathan made regular payments to Bryza on the Albany-Chicago account. Additionally, Nathan began making payments to Bryza on one other account — the Bulk Packaging Company account — in the spring of 1971.

From January, 1970 to July, 1973, Nathan paid Bryza, through Searsport, a total of $18,000. Nathan showed those payments on his company books as consulting fees. However, neither he, his companies, nor the companies he represented ever received any consulting services from Bryza, Searsport or "Charles W. Morgan." Rather, in Nathan's view, the payments ensured that he could continue to do business with I-H through Bryza.

Marvin Nathan was indicted with the defendant in case No. 74 CR 439. Although he testified that at the time he was involved in the transactions with Mr. Bryza, he did not believe he was engaged in any fraudulent conduct and was not aware that he may have been violating the law, he pleaded guilty to the charges and was sentenced to a term of probation plus a fine.

Nathan further stated that in the year since International Harvester uncovered Bryza's conduct and fired him, Nathan's business with I-H had doubled.

B. PAYMENTS FROM MAX SELZER

Max Selzer had been the president of Selzer-Ivice Sales, a manufacturer's representative company, since 1971. Selzer-Ivice represented a company called Airtex Products which had approximately $400,000.00 worth of sales per year to International Harvester.

In approximately mid-year, 1970, Selzer and Bryza had a luncheon meeting. During the luncheon, Bryza mentioned that he was working for I-H for under $11,000 per year and he further noted that manufacturer's representatives made a great deal of money. Approximately one month later, at another luncheon meeting between Bryza and Selzer, Bryza again stated that his I-H yearly salary was under $11,000. He also mentioned that other companies were making efforts to secure the I-H account which Airtex then enjoyed. Selzer responded that he was very grateful to have Bryza's good will and wanted to work out some plan to remunerate Bryza.

Approximately two weeks later, Bryza and Selzer had another luncheon date. During the luncheon, Selzer said that he had worked out a plan of remuneration and he offered to pay Bryza one-half of one per cent of the commission he received for selling Airtex products to I-H. Bryza accepted the proposal and suggested that the monies be paid to him as consultation fees. Bryza said he would contact Selzer later to advise him as to how the payments should be made. Several weeks later, Bryza called Selzer and told him that the payments should be made to the Searsport Company. In March, 1971, Selzer made his first payment to Bryza, through Searsport, and he continued to make the payments until August, 1973.

During the period from 1971-1973 Selzer paid approximately $4,500 to the Searsport Company. This amount represented the agreed upon percentage of the commissions Selzer-Ivice was receiving from Airtex Products.

From 1969 through 1973 the volume of business Airtex did with International Harvester remained relatively constant. According to Selzer, "we gave them the very best value that we could." The payments to Bryza apparently had no effect on increasing the sales to I-H. Selzer made other attempts to sell other products to International Harvester through Bryza but was unsuccessful in getting any further business.

Selzer believed that Bryza always acted in a very professional manner and described the defendant as a "good buyer". Selzer did not believe that his conduct was illegal and thought that he was acting in an honorable way. When Bryza and Selzer reached agreement on the payments, Selzer requested and received the defendant's social security number so that he could prepare the proper tax forms. He acted in this manner because, in his own words, "I did not want to be involved in any illegal activities."

Max Selzer was indicted with the defendant in case No. 74 CR 437. In return for his guilty plea and his cooperation with the government concerning other purchasing agents Selzer was paying, the prosecution recommended that he not be imprisoned. He received three years probation and a $4,000 fine.

Selzer-Ivice remains as the manufacturer's representative for Airtex Products in their dealings with International Harvester.

C. PAYMENTS FROM THE E.N.M. COMPANY AND THE POLYDORIS BROTHERS.

The E.N.M. Company, owned and run by three brothers, Nicholas, Stewart and Louis Polydoris, sold one of its products to I-H during the 1960's. In late 1969 or early 1970, Louis Polydoris began to call on Bryza at I-H rather frequently because he hoped to sell to I-H, through Bryza, a second E.N.M. product.

In the spring or summer of 1970, Louis Polydoris offered Bryza a gift of two airline tickets to Las Vegas. Bryza took the tickets, but approximately a week later, he told Polydoris that he had tried to turn the tickets in for cash and had been unsuccessful. Polydoris said he would arrange to get cash for the tickets. A week later, Polydoris gave Bryza an envelope containing $500 in cash, stating that the money was cash from the airline tickets.

In the late summer or early fall of 1970, Bryza and Louis Polydoris met after work for a drink in a bar. During that meeting, Bryza stated that it was time E.N.M. Company had someone at I-H looking out for E.N.M.'s affairs and acting as E.N.M.'s agent. Bryza then asked to be paid five percent of E.N.M.'s total sales to I-H. Polydoris responded that five percent was not built into the price of the products E.N.M. was selling to I-H and thus the proposed plan was unworkable. Bryza then suggested that Polydoris could increase by $1.00 per unit the previously quoted price of the second E.N.M. product — a service recorder — which I-H was going to purchase. Bryza asked that the additional $1.00 per unit be paid to him. However, Polydoris responded that that plan also was unworkable because it would be impossible to change the previously quoted price. Bryza then said that a payment plan was possible because he had a company to which payments could be made and that I-H could not trace the payments to him. Polydoris promised to look into the possibility of making payments in some form and told Bryza that he would get in touch with him later.

A day or two later, Polydoris telephoned Bryza at I-H. During that conversation, it was agreed that Bryza would send an invoice for $100 from Searsport. Shortly thereafter, Polydoris received the invoice which stated that it was for consulting services for November, 1970. It was signed by Charles W. Morgan. Polydoris authorized payment.

Subsequently, the Polydoris brothers received regular invoices from Searsport and as a result, the company owned by the brothers paid Bryza, through Searsport, $125 per month until April, 1971.

In approximately May, 1971, Bryza and Louis Polydoris had a telephone conversation in which Bryza stated that the $125 monthly payments were no longer acceptable and that he felt the Polydoris brothers should reconsider his previously suggested plan of paying five

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percent of E.N.M.'s total dollar sales to I-H. Polydoris said that he would contact Bryza later. Louis Polydoris then transferred the Searsport account to his brother, Stewart Polydoris.

In September or October, 1971, Stewart Polydoris first met Bryza at a luncheon meeting. During the meeting, Bryza stated that the $125 monthly payments no longer were acceptable and he again demanded to be paid five per cent of E.N.M.'s total sales to I-H. Stewart Polydoris refused to pay Bryza five per cent of the total sales, but did agree to increase the payments to $250 per month. The Polydoris brothers subsequently began to make monthly payments of $250 to Bryza through Searsport.

In May, 1973, the Polydoris brothers received an invoice from Searsport which stated that their account was delinquent and payment was requested. After receipt of the invoice, Louis Polydoris authorized a single $250 payment to Searsport although the invoice showed that $775 was past due. Accordingly, the Polydoris brothers received a letter from Searsport, dated May 29, 1973 and signed again by Charles W. Morgan, which stated that, because the account was delinquent, the Searsport consulting services would be terminated.

The Polydoris brothers paid Bryza, through Searsport, a total of approximately $6,000. However, no consulting services or any other services were rendered in return for the payments. In Louis Polydoris' view, the payments were made to ensure continued business with I-H.

There was a substantial dispute concerning the start of the payments to Bryza. According to the Polydoris brothers the money was coerced from them. According to the defendant, the payments were a mutually agreed upon arrangement with no pressure or coercion involved. Sometime in the spring of 1973, Nicholas Polydoris, the president of E.N.M., apparently learned of the payments for the first time. He brought this information to the attention of International Harvester.

D. PAYMENTS FROM THE BARTSCH TOOL AND SCREW COMPANY

The president of Bartsch Tool was Mr. Yeadon D. Mason, who was indicted with the defendant in case No. 74 CR 438.[6] Mason did not testify at this trial. Bartsch Tool was a small company which sold approximately $40,000 to $50,000 of merchandise to International Harvester per year.

The evidence against the defendant on this charge came from Mason's secretary, Mrs. Audrey Pulford. She testified that payments were made by Bartsch Tool to Searsport. Although she did not know the specifics, she was told that the payments were for consulting services provided by the defendant. The only other direct evidence concerning Bryza's relationship with Bartsch Tool came from the defendant. From January, 1972, to August, 1973, Bartsch received monthly invoices of $125.00 from Searsport. Payments were sent to cover the invoices. Bartsch received no apparent consulting services.

E. DEFENDANT'S DISMISSAL FROM INTERNATIONAL HARVESTER

In 1961, the Board of Directors of I-H adopted a conflict of interest policy. Under the policy, the company's expectation of the complete and undivided loyalty of its employees to the company was set forth. Additionally, the policy listed certain activities or interests which were considered to be in conflict with the interests of the company.[7]

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[6] Mason and Bryza were indicted together, but Judge Marshall severed Mason's case from Bryza's other cases which were pending before Judge Austin. Mason was subsequently acquitted.

[7] The prohibited activities or interests included:

"For an employee to seek or accept or to offer to provide directly or indirectly from or to any individual, partnership, association, corporation or other business entity or a representative thereof doing or

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Each year, in the month of January, every officer and management employee of I-H was required to sign a card stating that he understood I-H's policy and that he had no conflicts with or exceptions to it. In the event any employee believed that he had a conflict, he was required to submit the details. The I-H law department reviewed the details and a decision was then made as to whether or not a conflict existed, and, if so, what action was required.

Bryza was one of the I-H employees who was required to sign a conflict of interest card.

In the summer of 1973, International Harvester was informed by Nicholas Polydoris of the E.N.M. Company that they had been making payments to Kenneth Bryza. After some initial investigation by Mr. Gordon Lane, the I-H manager of auditing and Mr. Robert Parker, the director of purchasing to confirm the payments, Bryza was confronted. Some time prior to the confrontation, Mr. Lane had been in charge of an audit of the purchasing department. This audit concluded that all of the contracts Bryza handled were proper and that there was no evidence to indicate that the company was not getting a full measure of service from him.

Upon receipt of this information from E.N.M., Lane and Parker called Bryza in and asked him about it. The defendant falsely denied knowing anything about it. The defendant falsely denied knowing anything about the Post Office box, the Searsport Company or Charles W. Morgan. Bryza also falsely denied having received payments from suppliers.

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[7] (Continued)

seeking to do business with the company, or any affiliate of the company loans, except with banks or other financial instructions, services, payments, excessive entertainment and travel, vacation or pleasure trips, or any gift of more than nominal value or gifts of money in any amount."

At that point Bryza was reminded of the company's conflict of interest policy and summarily discharged. His personnel record stated that he was terminated for a conflict of interest. International Harvester has never made any demands on the defendant that he pay to them any of the monies he received through Searsport.

International Harvester has not taken any action against any of the suppliers who were making payments to Bryza. They continue to purchase from these same suppliers and do business with the manufacturer's representatives at about the same level as before. Indeed, as far as Marvin Nathan is concerned, his business with International Harvester has doubled.

II. THE DEFENDANT HAD THE REQUISITE SPECIFIC INTENT TO COMMIT AN OFFENSE UNDER THE MAIL FRAUD STATUTE.

Mail fraud, like all other crimes arising out of deceit or deception, requires a specific criminal intent. The burden is on the government to establish beyond a reasonable doubt that the defendant not only knowingly performed acts which the law forbids, but that he did the acts with intent to violate the law. Bryza argues that his conduct did not constitute a violation of the mail fraud statute because, in his view, International Harvester suffered no harm and he had no intent to defraud.

The mail fraud statute "is a broad proscription of behavior for purposes of protecting society." *United States* v. *Owen,* 231 F.2d 831, 832 (7th Cir. 1956); *United States* v. *Sylvanus,* 192 F.2d 96 (7th Cir. 1951). Whether or not the defendant had the specific criminal intent to defraud is governed by the conduct and state of mind of the schemer rather than the objects of the scheme. In *United States* v. *Faser,* 303 F.Supp. 380 (E.D.La. 1969), the defendants were charged with "depriving the State of Louisiana of the honest and faithful performance of their duties as public officials." The underlying scheme charged that the defendants had used their official positions to

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cause state funds to be deposited into non-interest bearing accounts in exchange for a kickback from the depository bank. Asserting that State funds were not required to be, nor were in fact, placed in interest bearing accounts, defendants argued that no criminal scheme was charged because of the absence of an allegation that the state was deprived of "anything of value which could be measured in terms of money or property" (303 F.Supp. at 383).

The court employed a dual analysis to reject this contention. First, it held that, on the basis of familiar agency principles, the amount of the kickback received by defendants belonged to the state and, therefore, the indictment charged, both expressly and by implication, that the state was defrauded out of a sum certain. Secondly, and of particular applicability here, the court recognized that, even in the absence of an object susceptible to measurement in terms of money or property, a mail fraud violation can be asserted where "a person defrauds the state of the 'loyal and faithful services of an employee.'" Id. at 384.

The faithful services rationale is applicable to the instant case and has found support in a variety of different factual situations. For example, in *United States* v. *Proctor & Gamble Co.*, 47 F.Supp. 676 (D. Mass. 1942), defendant companies were charged with obtaining confidential information from employees of a competitor. Upholding the viability of a mail fraud prosecution, the court focused not upon the property right represented by the information, but upon the deprivation of the employees' loyal services:

> "When one tampers with [the employer-employee] relationship for the purpose of causing the employee to breach his duty, he in effect is depriving the employer of a lawful property right. The actual deception is in the continued representation of the employee to the employer that he is honest and loyal to the employer's interest" 47 F.Supp. at 678.

United States v. *George*, 477 F.2d 508 (7th Cir.), *cert. denied* 414 U.S. 827 (1973) is directly analogous to the instant case and supports the notion that a deprivation of an employee's loyal services can amount to actual fraud under the mail fraud statute. There, three defendants were indicted for substantive mail fraud violations arising from a scheme in which Yonan, a buyer for Zenith Radio Corporation received kickbacks from Greenspan, a supplier, through middleman George. "The indictment alleged that the scheme deprived Zenith of its lawful money and property and of the honest and faithful performance of its employee Yonan's duties" (477 F.2d at 510).

Because the jury in *George* had been instructed that a knowing interference with the employer-employee relationship for the purpose of depriving an employer of his employee's honest and faithful services could amount to criminal fraud, this Court on appeal was compelled to reach the merits of the "honest and faithful services" issue. Upholding the instruction, Judge Cummings' opinion recognized that either the deprivation of honest and faithful services occasioned by the acceptance of secret profits or fraudulent activities to the actual detriment of the employer sufficed under the statute. In this case defendant Bryza's failure to disclose his receipt of kickbacks and consulting fees from International Harvester's suppliers resulted in a breach of his fiduciary duties depriving his employer of his loyal and honest services. Bryza's specific intent is manifested by the actions he took in preventing his employer and others from discovering this breach of his fiduciary duty. Bryza assumed a bogus name, "Charles W. Morgan," formed a phony company, and lied on his annual company statement that he had no conflict of interest. Whether or not Bryza had a specific criminal intent to defraud is clearly demonstrated by these overt acts to defraud. Simply because the employer, International Harvester, took no retributive action against the defendant does not mean that no crime was committed. Bryza argues that I-H

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suffered no harm and in fact still does business with the other parties who were indicted as a result of this scheme to defraud. However, as this Court stated earlier the defendant's intent must be judged by his actions, not the reaction of the mail fraud victims. International Harvester's decision not to take legal steps against Bryza and to maintain its business relationship with some of the other parties involved is probably based on a myriad of complex factors—both business and legal in nature. Nevertheless, it is clear that International Harvester was deprived of Bryza's honest and faithful services in addition to the right to make the best possible purchase. Although Bryza argues he obtained the best possible contracts for his employer, I-H was entitled to negotiate those purchases with the knowledge of its employee's interest. Thus, even though I-H was satisfied with Bryza's job performance and the products he purchased for I-H from its suppliers, and despite the fact that no preferential treatment, beyond receiving business, was accorded the suppliers, that the suppliers' prices to I-H were fair and reasonable, that I-H was never shown to be dissatisfied with the suppliers' prices or products, and that Bryza insisted upon efficiency, quality and fair prices from the suppliers, Bryza's conduct nonetheless falls within the purview of the mail fraud statute. The fraud consisted in Bryza's holding himself out to be a loyal employee, acting in I-H's best interests, but actually not giving his honest and faithful services, to I-H's real detriment. See *U.S.* v. *George (supra); United States* v. *Faser (supra); U.S.* v. *Barrett,* 505 F.2d 1091 (7th Cir. 1974); *U.S.* v. *Isaacs,* 493 F.2d 1124 (7th Cir. 1974).

We believe that the evidence established that Bryza's course of conduct amounted to an actual, rather than a constructive, fraud. By his own nefarious activities, the solicitations, the setting up of Searsport, the use of the alias Charles Morgan, the deceitful conflict of interest statements, Bryza was able to defraud International Harvester of his loyal and faithful services. In our

opinion his actions clearly show a specific intent and fall within the prohibition of the mail fraud statute.

III. THE TRIAL COURT DID NOT ERR IN INSTRUCTING THE JURY THAT THE LAW PRESUMES THAT EVERY PERSON KNOWS WHAT THE LAW FORBIDS.

Under our system of jurisprudence it has long been well established that every man is presumed to know the law. This principle stems from a common law inference of long-standing acceptance,* and is founded in the common sense concept that without it "[N]o penal law could be enforced, because there is no penal law a knowledge of which, by a due degree of self-stupefaction, could not be precluded." 1 F.Wharton, Criminal Law §102 at 142 (12th Ed. 1932).

In this case the trial court instructed the jury that the government had the burden of proving a specific intent on the part of the defendant to commit the crime but also that the defendant would be presumed to know what the

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* See *United States* v. *Murdock*, 290 U.S. 389, 393-396, 54 S.Ct. 233, 224-226, 78 L.Ed. 381 (1933); *Shevlin-Carpenter Co.* v. *Minnesota*, 218 U.S. 57, 68, 30 S.Ct. 663, 666, 54 L.Ed. 930 (1910); *Williamson* v. *United States*, 207 U.S. 425, 453, 28 S.Ct. 163, 173, 52 L.Ed. 278 (1907); *Turf Center Inc.* v. *United States*, 325 F.2d 793 (9th Cir. 1963); *Reyes* v. *United States*, 258 F.2d 774, 775, 782-784 (9th Cir. 1958); *Elwert* v. *United States*, 231 F.2d 928, 937 (9th Cir. 1955); *Finn* v. *United States*, 219 F.2d 894, 899-900 (9th Cir. 1955). Cf. *Lambert* v. *California*, 355 U.S. 225, 78 S.Ct. 240, 2 L.Ed.2d 228 (1957). Accord, LaBuy, Manual on Jury Instructions, Section 5.06-2.

Cohen v. *United States*, 378 F.2d 751, 756-757 (9th Cir. 1967), *cert. denied* 389 U.S. 897, 88 S.Ct. 217, 19 L.Ed 2d 215; *Edwards* v. *United States*, 334 F.2d 360, 366-368 (5th Cir. 1964), *cert. denied* 379 U.S. 1000, 85 S.Ct. 721, 13 L.Ed.2d 702.

Cf. *United States* v. *Miller*, 379 F.2d 483 (7th Cir. 1967), *cert. denied* 389 U.S. 930, 88 S.Ct. 291, 19 L.Ed.2d 281.

law requires and forbids unless outweighed by evidence to the contrary.' Bryza contends that those instructions

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'The court charged the jury that:

"Before a defendant may be found guilty of a crime, the prosecution must establish beyond a reasonable doubt that under the statute defined in these instructions the defendant was forbidden to do the act charged in the indictment and that he intentionally committed the act.

Now, the crime charged in this case requires proof of specific intent before the defendant can be convicted. 'Specific intent,' as the term implies, means more than the general intent to commit the act. To establish 'specific intent' the government must prove that the defendant knowingly did an act which the law forbids, purposely intending to violate the law. Such intent may be determined by you from all of the facts and circumstances surrounding this case.

Now, the defendant has offered evidence that he did not know that his conduct was unlawful. Unless outweighed by evidence to the contrary, the law presumes that every person knows what the law forbids and what the law requires to be done.

As I told you before, 'specific intent' is an element of the crime charged in the indictment, therefore the evidence that the defendant acted because of ignorance of the law is to be considered by you in determining whether or not the defendant acted with the required specific intent.

Now, the defendant in a criminal case, as I told you at the outset, is presumed by law to be innocent. That presumption remains with him throughout the trial unless and he is proven guilty of the crime charged by credible evidence beyond a reasonable doubt.

As I told you at the outset of the trial, the burden of proving the defendant guilty beyond a reasonable doubt rests upon the government. This burden never shifts throughout the trial. The law does not require a defendant to prove his innocence or to produce

had the effect of reducing the government's burden of proving lack of intent citing *Mann* v. *United States*, 319 F.2d 404, 409 (5th Cir. 1963); *United States* v. *Woodring*, 464 F.2d 1248, 1251 (10th Cir. 1972); and *Johnson* v. *United States*, 348 F.2d 772 (D.C. Cir. 1965). We have reviewed the cases cited by the defendant and believe that the instructions involved in those cases differ markedly from those in the instant case. The propriety of the knowledge of the law instruction cannot be viewed in isolation but must be considered with the other charges instructing the jurors that the burden of proof never shifts from the government. *Cupp* v. *Naughton*, 414 U.S. 141 (1973); *United States* v. *Bessesen*, 445 F.2d 463, 468 (7th Cir. 1971).

Thus, the instructions about which Bryza complains properly were accompanied by an instruction to the jury that they had to find that the defendant acted with specific intent, and the concept of specific intent was fully explained, as were the terms "knowingly," "willfully" and "intent to defraud". Furthermore, the jury was fully instructed that it could consider the defendant's evidence that he acted because of ignorance of the law in determining whether he acted with the requisite specific intent. Finally, the jury was clearly told that the burden of proof rests upon the government, that it never shifts to the defendant, that the law does not require a defendant to prove his innocence or produce any evidence and that it was the jury's duty to acquit if the government failed to prove the defendant guilty beyond a reasonable doubt. We find no error in the instructions dealing with the defendant's specific intent and the presumption of knowledge of what the law requires and forbids.

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any evidence. He may rely upon evidence brought out on cross examination of witnesses for the government, and if the government fails to prove the defendant guilty beyond a reasonable doubt, it is your duty under those circumstances to acquit him."

IV. ADMISSION OF FACT THAT BRYZA'S CO-DEFENDANTS HAD PLED GUILTY WAS NOT IMPROPER UNDER THE CIRCUMSTANCES.

Over the defendant's objection the court permitted witness Nathan and witness Selzer to testify that they had plead guilty to the same charges for which Bryza was being tried. Prior to the testimony of Selzer and Nathan, the defendant moved to exclude any testimony concerning their pleas of guilty and their subsequent convictions and sentences. In making the motion *in limine* the defendant agreed to give up his right to cross-examine the witnesses concerning their pleas and therefore not to make any attempt to impeach their credibility by bringing out the convictions during cross-examination. The trial judge denied the motion. The trial judge was correct in denying the motion because defense counsel had previously brought out during the examination of Stewart Polydoris that Polydoris was involved in the scheme but not indicted.[10]

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[10] During the cross-examination of government witness Stewart Polydoris by counsel for Bryza, the following colloquy occurred:

"Q. Now, by the way, do you know that the government has charged in the indictment here that you and your brother Louis entered into an illegal scheme with Mr. Bryza? Are you aware of that, sir?

A. Apparently that is correct.

Q. You are aware of that, is that correct?

A. Yes, sir.

Q. All right, and as a matter of fact, however, no criminal proceedings have been instituted by the government against you, your brother Nick, your brother Lou or the E.N.M. Company or the Stevens Company, is that correct, sir?

A. Stevens Engineering Company?

Q. Yes, sir.

A. No.

Q. Is that correct, there has been no criminal proceedings against any of the people I have just named?

As a result of this examination, the fact that the Polydoris brothers were named in the same indictment charging Bryza, but were not prosecuted for the offenses set forth therein, was clearly brought to the attention of the jurors. Thus defense counsel opened the door to the subject as a result of his cross-examination of Stewart Polydoris. Had the information that Selzer and Nathan were charged and convicted not been brought to the jury's attention, the plain inference which the jury would have been left to draw was that all parties to the charged scheme, save Bryza, were permitted by the government to go unpunished for their illegal activities. Thus, to foreclose the possibility that the jury might incorrectly believe that the government had singled out Bryza for prosecution and punishment, while permitting his co-schemers to go free, the testimony at issue properly was elicited.

Normally the fact that co-defendants have entered guilty pleas has no place in another defendant's trial. Guilty pleas of co-defendants should be brought to the attention of the jury in only certain narrow instances[11]; i.e., when it is used to impeach trial testimony or to reflect on a witness' credibility in accordance with the standard rules of evidence; where other co-defendants plead guilty during trial and are conspicuously absent;

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[10] (Continued)

A. Not to my knowledge.

Q. And certainly if somebody instituted a criminal proceeding against you, you would be aware of it, is that correct — I will withdraw that, I am sorry.

A. Against me personally?

Q. You know of none?

A. No sir."

[11] *United States* v. *Kahn*, 381 F.2d 284 (7th Cir. 1967); *United States* v. *Aldridge*, 484 F.2d 655 (7th Cir. 1973); *United States* v. *Harris*, 437 F.2d 686 (D.C. Cir. 1970); *United States* v. *King*, 505 F.2d 602 (5th Cir. 1974).

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where opposing counsel has left the impression of unfairness which raises the issue or invites comment on the subject. In all of these situations the trial judge should give a cautionary instruction concerning the guilty pleas when he charges the jury. However, if the trial judge thinks that the admission of co-defendant's guilty pleas arose out of aggravated or egregarious circumstances and that even the strongest currative instruction would be insufficient he can take more drastic action such as declaring a mistrial. Cf.: *United States* v. *Baete*, 414 F.2d 782 (5th Cir. 1969). In some cases this entire problem could be avoided by simply allowing counsel to bring out the fact that the co-defendants were indicted, thus avoiding the impression that the government is being unfair without telling the jurors that the co-defendants had actually admitted their guilt.

In the instant case, the testimony of Selzer and Nathan regarding their guilty pleas was very brief, was not referred to after it initially was adduced, and each time the information was brought out, the jury was carefully instructed that the fact that the witnesses pled guilty was not to be considered as any evidence of Bryza's guilt. And during the charge to the jury, the court again instructed the jurors that:

> "As I told you before, the fact that a co-defendant pleads guilty is not evidence of the guilt of this defendant or that the crime charged in the indictment was committed. The guilt or innocence of the defendant on trial must be determined by you solely by the evidence introduced in the trial of this case which has just concluded."

Accordingly, the defendant was fully protected against the possibility that the jury might consider the evidence of the guilty pleas in an improper manner.

V. THE COURT PROPERLY INSTRUCTED THE JURORS CONCERNING AN EMPLOYEE'S DUTY OF DISCLOSURE AND CONFLICT OF INTEREST.

Defendant argues that the instructions given by the trial judge "all but told" the jurors to return a guilty verdict; that instructions 55 through 57 effectively destroyed Bryza's defense contentions—that there was no intent to defraud; that his activities did not amount to a "scheme to defraud"; and that he had no inkling that he was violating federal law.

We have reviewed the instructions[12] given and believe

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[12] The instructions concerning duty of disclosure and conflict of interest were as follows:

"The defendant, as purchasing agent employed in the purchasing department of International Harvester Company had a duty to disclose and not to conceal facts known to him which he had reason to believe were material to the decisions of International Harvester Company in purchasing parts and equipment to be used by International Harvester Company and its wholly owned subsidiaries in the manufacture of their products.

The fact that the defendant did not himself have responsibility for the purchasing of parts and equipment does not affect in any way his duty of disclosure.

If you should find, beyond a reasonable doubt, after considering all the evidence, that the defendant devised a scheme in which he would breach this duty of disclosure, then you may find that the defendant engaged in a scheme to defraud International Harvester.

A conflict of interest exists whenever an employee, in his capacity as an employee or in the performance of his duties, takes actions which have or predictably may have an effect on his personal financial interest contrary to or against the best interests of his employer.

The term 'actions' includes any direct or indirect personal participation in a decision, approval, disapproval, recommendation, or rendering of advice

that they were proper when considered in the total context of this case. The duty of disclosure instruction was predicated upon the *George* (*supra*) case which, as previously discussed, plainly includes a duty not to conceal facts known to him which he has reason to believe are material to the employer's conduct of its business and affairs. Bryza's duty of disclosure in this case was predicated upon the right of I-H, as set forth in its policy, to do business with its suppliers in possession of all relevant facts. Bryza's receipt of monies from I-H suppliers, while at the same time, he denied that he had any conflicts of interest, constituted material misrepresentations and involved the concealment of material facts which in and of themselves were violations of the mail fraud statute.

The duty of disclosure instruction did not, as Bryza contends, virtually direct the jury to find him guilty. Rather, the instruction simply stated that the jury may find the existence of a scheme within the meaning of the mail fraud statute if it should find from all the evidence, that Bryza devised a plan in which he would breach his duty of disclosure. The instruction, moreover, must be considered in the context in which it was given. Viewing it together with the court's charge on specific intent, it clearly did not direct the jury to return a guilty verdict.

Finally, the court's instruction to the jury on the definition of a conflict of interest was quite proper. Throughout

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[12] (Continued)

regarding a contract in which the employer has a financial interest.

A conflict of interest may be avoided or rectified if the employee fully informs his employer or the responsible officials of the corporation that employs him of the nature and circumstances of the matter and his personal financial interest in the matter and if the employer, having been fully informed, determines that the employee's interest is either not so substantial as to be improper or not likely to affect the integrity of the services which the employer expects from said employee."

the trial of the case, the jury heard testimony regarding conflicts of interest. They had a right to know what the definition of that term was. The instant instruction did no more than explain in plain language the meaning of a conflict of interest.

Since the charge to the jury with respect to the meaning of a conflict of interest and Bryza's duty of disclosure accurately reflects the state of the law, and because the charge required a finding of specific intent to defraud as a prerequisite to a finding of guilt, no error can be attributed to the instructions here at issue.

Finally, the defendant offered four instructions which the trial court refused to give to the jury, i.e. (1) it was not per se illegal for Bryza to accept these payments, or (2) to use an assumed name; (3) that Bryza's entire employment relationship with I-H and (4) the quality and price of the items purchased could be considered on the issue of defendant's intent to defraud. Even assuming that there is nothing inherently wrong with these instructions, we do not believe that the trial judge's refusal to give the tendered instructions amounted a reversible error. The trial judge had observed the entire case before ruling on instructions. Thus we must rely on his discretion in refusing the instructions. Perhaps, as the government argues, the trial court believed that giving those instructions would unduly single out and emphasize pieces of evidence. A review of the record shows that the trial court allowed Bryza to show his capable service to I-H, the high quality of goods received, and the alleged reasonableness of prices paid. Thus the proposed instructions would merely attempt to emphasize portions of the evidence rather than instruct the jurors as to the law. The court had the discretion to refuse the instructions. *Blauner* v. *United States*, 293 F.2d 723 (8th Cir.), *cert. denied* 368 U.S. 931 (1938); *United States* v. *Terry*, 362 F.2d 914 (6th Cir. 1966); *United States* v. *Thomas*, 484 F.2d 909 (6th Cir.), *cert. denied* 415 U.S. 924 (1973).

Accordingly, the judgment of conviction is affirmed.

AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

February 12, 1976.

Before

Hon. LEONARD P. MOORE, Sr. Circuit Judge*
Hon. WALTER J. CUMMINGS, Circuit Judge
Hon. WILLIAM J. BAUER, Circuit Judge

No. 75-1215, 75-1216, 75-1217 and 75-1218

UNITED STATES OF AMERICA,

Plaintiff-Appelle

vs.

KENNETH J. BRYZA,

Defendant-Appellan

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.
(74 Cr 439, 74 Cr 438, 74 Cr 437, 74 Cr 433)

On consideration of the petition for rehearing and su gestion that it be reheard *en banc* filed in the above-entitl cause, no judge in active service having requested a vo thereon, nor any judge having voted to grant the sugge tion, and all of the members of the panel having voted deny a rehearing.

IT IS ORDERED that the petition for a rehearing the above-entitled cause be, and the same is hereb DENIED.

* Sr. Circuit Judge Leonard P. Moore of the Seco Circuit is sitting by designation.

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1295

KENNETH J. BRYZA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 522 F.2d 414.

JURISDICTION

The judgment of the court of appeals was entered on August 25, 1975. A timely petition for rehearing with suggestion for rehearing *en banc* was denied on February 12, 1976 (Pet. App. B). The petition for a writ of certiorari was filed on March 12, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the district court abused its discretion by permitting the government to introduce into evidence the fact that two co-defendants pleaded guilty to the same

offense with which petitioner was charged, after cross-examination by the defense of an indicted co-conspirator elicited the fact that he had not been prosecuted for the offense.

2. Whether the mail fraud statute prohibits use of the mails for the purpose of transmitting "kickbacks" on supply contracts.

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Illinois, petitioner was convicted on 39 counts of mail fraud, in violation of 18 U.S.C. 1341, and on one count of using a false name to carry out the mail fraud scheme, in violation of 18 U.S.C. 1342.[1] He was sentenced to concurrent terms of one year's probation on each count, with a special condition that the first 177 days were to be served in the custody of the Attorney General, and was fined a total of $5,000. The court of appeals affirmed (Pet. App. A).

The evidence showed[2] that petitioner was employed by International Harvester Company as a purchasing agent. In that capacity, without the knowledge of International Harvester, petitioner accepted payments from suppliers in return for his implied assurance that Inter-

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[1]Petitioner was charged in four indictments. Prior to trial, eight of the mail fraud counts were dismissed on the government's motion. Petitioner was convicted on all the remaining counts, each of which, except the one count alleging a violation of 18 U.S.C. 1342, charged a single mailing in execution of the scheme (Pet. App. 3a and n. 4).

[2]This brief statement of the facts is derived from the opinion of the court of appeals (Pet. App. 1a-13a).

national Harvester would continue to purchase their products.[3] The payments included $18,000 from Marvin Nathan, a sales representative of a number of suppliers; approximately $4,500 from Max Selzer, president of another supplier; approximately $6,000 from the Polydoris brothers, owners of a third supplier; and $125 per month from Yeadon Mason, president of a fourth supplier.[4] The payments were sent through the mails to a company that petitioner owned, which he organized to receive such payments. When International Harvester learned of the payments, it summarily discharged petitioner.

ARGUMENT

1. Petitioner contends that the court erred in permitting the government to introduce into evidence the fact that two co-defendants had pleaded guilty to the same offense with which petitioner was charged. During cross-examination of Stewart Polydoris, defense counsel elicited the fact that although the Polydoris brothers had been named with petitioner in the indictment, they had not

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[3]Under the terms of his employment contract, petitioner was prohibited from "* * * seek[ing] or accept[ing] or * * * offer[ing] to provide directly or indirectly from or to any individual, partnership, association, corporation or other business entity or a representative thereof doing or seeking to do business with the company, or any affiliate of the company loans, except with banks or other financial instructions, services, payments, excessive entertainment and travel, vacation or pleasure trips, or any gift of more than nominal value or gifts of money in any amount" (Pet. App. 11a-12a n. 7).

[4]Nathan and Selzer were indicted with petitioner and charged on thirteen counts of mail fraud. Each of them pleaded guilty and was sentenced to a term of three years' probation and a fine of $1,000. Mason was charged on ten counts of mail fraud but subsequently was acquitted in a jury trial (*id.* at 2a-3a n. 3).

been prosecuted. Thereafter, over defense objection,[5] the court permitted the government to elicit from both Nathan and Selzer the fact that each of them also had been named in the indictment and had pleaded guilty (Pet. App. 20a-21a). Immediately after each witness so testified, the court carefully instructed the jury that the fact that the witness had pleaded guilty was not to be considered as evidence of petitioner's guilt. During its charge to the jury, the court again instructed the jury (Pet. App. 22a):

> As I told you before, the fact that a co-defendant pleads guilty is not evidence of the guilt of this defendant or that the crime charged in the indictment was committed. The guilt or innocence of the defendant on trial must be determined by you solely by the evidence introduced in the trial of this case which has just concluded.

It is established that the court has discretion to admit evidence of the guilty plea of co-defendants. *United States* v. *Lewis*, 524 F.2d 991, 992 (C.A. 5); *United States* v. *Kubitsky*, 469 F.2d 1253, 1255 (C.A. 1), certiorari denied, 411 U.S. 908. There was no abuse of discretion in the instant case. When the defense elicited the fact that the Polydoris brothers had been indicted but had not been prosecuted, it opened the door to the subject of criminal proceedings that the government had brought against others who were indicted with petitioner. As the court of appeals noted (Pet. App. 21a):

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[5]Prior to the testimony of Selzer and Nathan, petitioner moved to exclude any testimony concerning their pleas of guilty. In making this motion, petitioner said he would give up his right to cross-examine the witnesses concerning their pleas, and therefore would not make any attempt to impeach their credibility by bringing out their convictions. The trial judge denied the motion (Pet. App. 20a).

> Had the information that Selzer and Nathan were charged and convicted not been brought to the jury's attention, the plain inference which the jury would have been left to draw was that all parties to the charged scheme, save [petitioner], were permitted by the government to go unpunished for their illegal activities.

Moreover, the court's cautionary instructions eliminated any substantial possibility that petitioner might be improperly prejudiced by the admission of this evidence. See *United States* v. *King*, 505 F.2d 602, 607 (C.A. 5).

Petitioner further contends that admission of evidence of the guilty pleas of co-defendants, when the defense elicits the fact that a co-indictee has not been prosecuted, impermissibly penalizes the defendant's Sixth Amendment right to confrontation. What petitioner characterizes as a penalty, however, is merely a strategic disadvantage that may flow from a tactical decision by the defense to open the subject of criminal proceedings brought against other indictees, analogous to any other strategic disadvantage that may result when the defense decides to open the door to certain subjects, such as prior convictions or reputation. Cf. *Walder* v. *United States*, 347 U.S. 62, 64; *Michelson* v. *United States*, 335 U.S. 469, 479, 485; *McGautha* v. *California*, 402 U.S. 183, 213.[6]

2. Petitioner contends that the government's proof did not establish a violation of the mail fraud statute, since it was not shown that his acts caused his employer to lose business, profits, or good will. 18 U.S.C. 1341 provides, in pertinent part, that it shall be illegal to "[devise]

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[6]Petitioner's reliance on *Smith* v. *Illinois*, 390 U.S. 129, and *Alford* v. *United States*, 282 U.S. 687, is misplaced, for in those cases the scope of cross-examination was curtailed. Here, by contrast, cross-examination was not curtailed.

or [intend] to devise any scheme or artifice to defraud" and to use the mails in furtherance of such scheme. The provision encompasses any act or scheme of deception that causes detriment to a party that relies upon it, and that entails use of the mails. *United States* v. *Carter,* 217 U.S. 286, 308. In the instant case, petitioner's employer relied upon the fact that petitioner undertook, as its purchasing agent, to obtain for it supplies at lowest cost. But the payments to petitioner from the suppliers, to ensure continued business with petitioner's employer, represented a portion of the price which the employer paid for the supplies. Even if this price was competitive, petitioner's employer was entitled to the profit that petitioner enjoyed; petitioner's "kickback" therefore resulted in a real detriment to the employer. See *United States* v. *Drumm,* 329 F.2d 109, 113 (C.A. 1); *United States* v. *Bowen,* 290 F.2d 40, 44-45 (C.A. 5); *United States* v. *George,* 477 F.2d 508 (C.A. 7), certiorari denied, 414 U.S. 827.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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MAY 1976.

DOJ-1976-05